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No. 373

In the Supreme Court of the United States

October Term, 1958

CERTAIN INTERESTS IN PROPERTY IN HILLSBOROUGH COUNTY, STATE OF FLORIDA; TAMPA BAY GARDEN APARTMENTS, INC., ET AL., PETITIONERS

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

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OPINIONS BELOW

The opinion of the district court, dated March 27, 1958 (Pet. App. 1-5), is reported at 161 F. Supp. 424. Its opinion of May 12, 1958, reported at 161 F. Supp. 426-427, is printed as an appendix to this brief (*infra*, pp. 12-14). The opinion of the court of appeals (Pet. App. 6-14) appears at 257 F. 2d 844.

JURISDICTION

The judgment of the court of appeals was filed on August 1, 1958. The petition for a writ of certiorari

was filed on October 20, 1958. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

Whether the court of appeals correctly held that the district court had acted beyond its powers in undertaking to review the adequacy of estimated compensation deposited by the United States in conjunction with the Government's filing of a declaration of taking.

STATUTES INVOLVED

Section 1 of the Declaration of Taking Act of February 26, 1931, 46 Stat. 1421, 40 U.S.C. 258a, provides in part:

> In any proceeding in any court of the United States outside of the District of Columbia which has been or may be instituted by and in the name of and under the authority of the United States for the acquisition of any land or easement or right of way in land for the public use, the petitioner may file in the cause, with the petition or at any time before judgment, a declaration of taking signed by the authority empowered by law to acquire the lands described in the petition, declaring that said lands are thereby taken for the use of the United States. Said declaration of taking shall contain or have annexed thereto—
>
> * * * *
>
> (5) A statement of the sum of money estimated by said acquiring authority to be just compensation for the land taken.

Upon the filing said declaration of taking and of the deposit in the court, to the use of the persons entitled thereto, of the amount of the estimated compensation stated in said declaration, title to the said lands in fee simple absolute, or such less estate or interest therein as is specified in said declaration, shall vest in the United States of America, and said lands shall be deemed to be condemned and taken for the use of the United States, and the right to just compensation for the same shall vest in the persons entitled thereto; and said compensation shall be ascertained and awarded in said proceeding and established by judgment therein, * * *.

* * * *

Upon the filing of a declaration of taking, the court shall have power to fix the time within which and the terms upon which the parties in possession shall be required to surrender possession to the petitioner. The court shall have power to make such orders in respect of encumbrances, liens, rents, taxes, assessments, insurance, and other charges, if any, as shall be just and equitable.

Section 4 of the Declaration of Taking Act (40 U.S.C. 258d) provides:

The right to take possession and title in advance of final judgment in condemnation proceedings as provided by this Act shall be in addition to any right, power, or authority conferred by the laws of the United States or those of any State or Territory under which such proceedings may be conducted, and shall not be construed as abrogating, limiting, or modifying any such right, power, or authority.

Section 512 of the Housing Act of 1956, Act of August 7, 1956, 70 Stat. 1091, 1111, 42 U.S.C., Supp. V, 1594a, amending Section 404 of the Housing Amendments of 1955, provides, in part, as follows:

> (c) Condemnation proceedings instituted pursuant to this section shall be conducted in accordance with the provisions of the Act of August 1, 1888 (25 Stat. 357; 40 U.S.C., sec. 257) as amended, or any other applicable Federal statute. Before any such condemnation proceedings are instituted, an effort shall be made to acquire the property involved by negotiation. In any condemnation proceedings instituted pursuant to this section, the court shall not order the party in possession to surrender possession in advance of final judgment unless a declaration of taking has been filed, and a deposit of the amount estimated to be just compensation has been made, under the first section of the Act of February 26, 1931 (46 Stat. 1421), providing for such declarations. Unless title is in dispute, the court, upon application, shall promptly pay to the owner at least 75 per centum of the amount so deposited, but such payment shall be made without prejudice to any party to the proceedings. * * *

STATEMENT

This case involves the acquisition by condemnation of the lessees' interest in so-called "Wherry" housing located near MacDill Air Force Base, Tampa, Florida. The housing was constructed upon federal property under long-term leases executed in 1949 and subsequent years, subject to rental and other limitations,

for the purpose of housing military and civilian personnel and their dependents. See *Offutt Housing Co.* v. *Sarpy County*, 351 U. S. 253. Congress has authorized acquisition of such projects by the United States subject to stated conditions. If efforts to acquire by negotiation prove fruitless, condemnation proceedings may be instituted (Section 512 of the Housing Act of 1956, *supra*). The statute further provides that the court shall not order a surrender of possession until a declaration of taking has been filed and estimated compensation deposited in court. Finally, it directs that, unless there is a title dispute, 75% of the deposit shall be paid promptly to the owner.

The Government's complaint, filed January 29, 1958, was one to acquire the outstanding leasehold interests, subject to outstanding mortgages, of Tampa Bay Garden Apartments and Tampa Bay Manor, Inc., both Florida corporations, together with various access roads, water and sewer rights of way, etc. A declaration of taking, executed on January 17, 1958 by the Assistant Secretary of the Air Force, was filed, and estimated compensation totaling $100,000 was deposited in court. The complaint asked that possession be delivered on January 31, 1958.

On January 29, the two corporations moved to vacate the declaration of taking and to prevent the entry of an order of possession, alleging that the estimate of just compensation was arbitrarily and capriciously made and was so inadequate as to constitute the perpetration of a fraud on the condemnees. Attached was a letter written in July of 1957 by the

Department of Defense to the Chairman of the Armed Services Committee of the Senate which established "Formula Cost" of the project under the Housing Act of 1956 as $1,617,917. At a hearing on January 29, the court declined to enter an order of possession stating that "they are going to have to reconcile that [the estimated compensation and the July 1957 figure] before the Court will issue an order of possession," and that "The Court has got to arrive at some reasonable figure here."

In February, petitioners moved to dismiss the complaint and again sought to vacate the declaration of taking. The Government amended its complaint to allege that efforts to acquire the interests involved by negotiation had been unsuccessful. In early March, an amendment to the declaration of taking was filed increasing the deposit to $400,500. Petitioners' motions to vacate and to dismiss were renewed.

By order of March 27, 1958, the motion to dismiss was denied, but the motion to vacate the declaration of taking was granted and the United States given 60 days in which to file an amended declaration of taking. In its opinion, the district court held that it had jurisdiction to determine whether the amount of deposit was arrived at in good faith and that, under the facts of this case, "the Court could under no theory hold that the sum of $400,500.00 was just compensation arrived at in good faith for the taking of the above Defendants' interest in the properties described in the Complaint, as amended, and in the Declaration of Taking, as amended."

The United States moved to set aside the order, submitting the affidavit of an Assistant Secretary of the Air Force reciting that the Department of Justice had obtained a fair market value appraisal of $400,500 from Mr. William W. Mollan, a member of the American Institute of Real Estate Appraisers, and that accordingly the Air Force had transmitted to the Department of Justice estimated compensation in that amount. This motion was denied on May 12, the court filing a second opinion in which it reasserted the power to review the adequacy of the deposit.

Upon petition of the United States, the court of appeals held that the district court had no jurisdiction to vacate a declaration of taking or to refuse to order delivery of possession because it deemed the amount of estimated compensation to be inadequate, and that action purporting to do so could be corrected by mandamus. No formal writ was issued since the district judge, in answering the petition, had stated he would abide by any order entered. On August 22, 1958, District Judge Whitehurst, to whom the case had been transferred, ordered that possession be delivered effective September 1, 1958 (Appendix, *infra*, p. 14).

ARGUMENT

1. If, as we argue below, the district court's order was beyond its jurisdiction, it was within the power of the court of appeals to entertain an application for relief by way of mandamus. Petitioners suggest that there was no occasion for seeking an extraordinary remedy because the Government could have ob-

tained possession by depositing an amount deemed satisfactory by the district court. But compliance with an unauthorized order can hardly be deemed an adequate "remedy," especially when the consequences of such compliance might be to jeopardize public rights. The Housing Act (*supra*, p. 4) calls for an immediate and substantial distribution of the deposit. Wherry housing, it should be noted, was constructed by corporations organized for that purpose and possessing no other assets. There is thus no practical assurance that if advance payments were made in amounts exceeding the sum ultimately determined to constitute just compensation recoupment would be available to the Government. In such circumstances, the court of appeals could certainly consider, on application for mandamus, the power of the district court to take the extraordinary step of vacating a declaration of taking. See generally *Roche* v. *Evaporated Milk Ass'n*, 319 U. S. 21, 26; *Ex Parte United States*, 287 U. S. 241; *Maryland* v. *Soper (No. 1)*, 270 U. S. 9, 27-30.

2. The court of appeals' holding that the courts are not authorized to determine the amount to be deposited was clearly correct. The Declaration of Taking Act empowers the acquiring agency, not the courts, to estimate just compensation. Congress defined the powers of the court in regard to orders of possession, etc., in the concluding paragraph of Section 1 of the Act (*supra*, p. 2). No authority to review the amount of the estimate is conferred. And the fact that title vests upon the mere filing of the

declaration, without court approval or opportunity of the condemnees to object, shows that Congress did not contemplate review proceedings. The debates likewise show an intention to rely upon administrative authorities to make the estimates. 74 Cong. Rec. 778, 779.

The decisions of the courts of appeals uniformly hold that, although the judiciary may dismiss proceedings for lack of authority to condemn, there is no power to vacate a declaration of taking for such reasons as disagreement with the amount of the deposit. *United States* v. *6.74 Acres of Land*, 148 F. 2d 618 (C. A. 5); *United States* v. *Hayes*, 172 F. 2d 677, 679 (C. A. 9); *United States* v. *Carey*, 143 F. 2d 445, 450 (C. A. 9); *United States* v. *Certain Parcels of Land*, 215 F. 2d 140 (C. A. 3). Cf. *Berman* v. *Parker*, 348 U. S. 26.

Petitioners apparently assume that landowners have a vested right to a deposit. But the entire Declaration of Taking Act procedure is a creature of statute and not a constitutional requirement. Cf. *United States* v. *Dow*, 357 U. S. 17. That Act had two purposes: (1) to alleviate hardships upon landowners by giving them estimated compensation on an interim basis; (2) to enable the Government to proceed with its project and to reduce its interest liability. *United States* v. *Miller*, 317 U. S. 369. Congress never reported, however, to have the courts play a role in the matter of estimation. Petitioners' effort to read an exception into the statutory scheme whenever it is alleged that the estimate was not made in

good faith would mean in practical effect, as the court of appeals observed, that a district judge "could superintend the whole act of taking, vesting title, and acquiring possession, and thereby prevent its accomplishment unless the amount estimated measured up to his idea of what that amount should be" (Pet. App. 12).

Since the estimate has no effect on the final award, no substantial right of the landowners is denied by the decision below. If the estimate falls short of the ultimate award, the condemnee is compensated for the delay in payment by the allowance of interest. On the other hand, court review of the amount of the deposit would seriously impair the effectiveness of the statutory procedures, which aim at expedition. Examination of the deposit would require, in effect, that there be two trials on the issue of compensation.[1]

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[1] Although there is no occasion to reach the question, we deny that there is any basis for charging that the Government estimate was made in bad faith. The affidavit of the Assistant Secretary of the Air Force that the $400,500 deposit was based on an independent appraisal stands unchallenged. At most, the facts would indicate disagreement between that appraiser and those who arrived at the $1,617,917 figure and the $1,080,000 amount. Under any view, that is not bad faith. And the fact is that the two figures in excess of a million dollars are not estimates of just compensation or fair market value based upon an appraisal. They were based upon a formula prescribed by Congress as the *maximum* for the possible purchase of Wherry housing—a formula which gives primary emphasis to estimated replacement cost. See Section 404 of the National Housing Act as amended by the Housing Act of August 7, 1956, 70 Stat. 1091, 1111.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted,

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Solicitor General.

PERRY W. MORTON,
Assistant Attorney General.

ROGER P. MARQUIS,
Attorney.

NOVEMBER 1958

APPENDIX

Opinion of the District Court, dated May 12, 1958.

BARKER, District Judge:

This cause came on to be heard upon Motion of the United States to set aside the Court's Order vacating the Declaration of Taking, as amended, and for a rehearing of said Order. The Court has examined the said Motion and considered the brief attached to and made a part of said Motion. The Government in its Motion and in its brief raises 3 grounds for the granting of the relief sought by said Motion.

First: That the Court is without jurisdiction in this cause to set aside the Declaration of Taking.

Second: That the estimated amount of compensation as determined by the Secretary of Defense is conclusive upon the Court and that the Court has no right to hear or determine whether the amount deposited with the Declaration of Taking is estimated just compensation.

Third: That there is a difference between estimated just compensation and just compensation.

The arguments raised in said Motion were the same as argued before the Court at the time of the entry of its Order vacating the Declaration of Taking, as amended. The Statute under which this proceeding was brought (Title 42, Sec. 1594a (a-c), U.S.C.A.) requires that an estimated just compensation must be deposited in order for the Declaration of Taking to be effective. The Court cannot agree with the United States that it was the intention of Congress to authorize the Secretary of Defense to deposit any sum of money he might see fit without the privilege

of the landowners to have the same reviewed by the Courts. If the amount of estimated just compensation is solely within the discretion of the Secretary of Defense, the United States in filing a Declaration of Taking could be permitted to deposit the sum of $1, no matter how valuable the property taken might be. It is significant that the Statute provides that estimated *just* compensation must be deposited. If it were the intention of Congress that the estimate of compensation was solely within the discretion of the Secretary of Defense, why did Congress insert the word "*just*"? This Court is of the opinion that the insertion of the word "*just*" necessarily implies that Congress intended for the Court, in a litigated case, and especially where, as here, the issue of the lack of good faith was presented timely and amply supported by the letters of the United States which were admitted in evidence, to determine whether the sum deposited, with the Declaration of Taking, was an "estimate of just compensation."

The Court, in arriving at its decision in entering the Order to vacate the Declaration of Taking, considered that the various valuations placed upon the leasehold interest, sought to be condemned, by the Government, in the letters introduced in evidence, were estimates on the part of the Secretary of Defense as to just compensation for the property sought to be taken, and, as pointed out in the memorandum opinion heretofore filed, there is great disparity between the several estimates of just compensation made by the Government. It is, therefore, the opinion of the Court that the Motion of the United States, as hereinbefore described, should be denied. An Order in accordance with this opinion will be entered.

Order of the District Court, filed August 22, 1958.

THIS CAUSE coming on this day to be heard pursuant to Notice, and counsel for the respective parties having argued the same before the Court, and the Court being advised in the premises, it is

ORDERED that the defendants do surrender possession of the property described in the complaint as amended effective as of 12:01 A. M., September 1, 1958. And it is further

ORDERED that all other matters presented by said Motion are reserved for further consideration and decision by the Court.

DONE AND ORDERED in Chambers at Tampa, Florida, this 22nd day of August, 1958.

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